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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS, COMMISSIONER OF IOWA STATE DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS

v.

LINDA ALCALA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (Br. in Opp. App. A) is reported at 362 F. Supp. 180. The opinion of the court of appeals (Pet. App. A) is reported at 494 F. 2d 743.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1974. The petition for a writ of cer-

tiorari was filed on May 15, 1974, and granted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a fetus is a "child" within the meaning of Section 406(a) of the Social Security Act.

STATUTE AND REGULATORY PROVISIONS INVOLVED

Section 406(a) of the Social Security Act of 1935, 49 Stat. 629, as amended, 42 U.S.C. 606(a), in pertinent part provides:

> The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and * * * a student regularly attending a school * * *.

45 C.F.R. 233.90(c)(2), relating to federal payments to states in support of their participation in the program of aid to families with dependent children, in pertinent part provides:

(2) Federal financial participation is available in:

* * * * *

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis; * * *.

INTEREST OF THE UNITED STATES

Pursuant to Sections 401 through 410 of the Social Security Act of 1935, as amended, 42 U.S.C. 601 through 610, the United States provides for a public assistance program of aid to families with dependent children ("AFDC"). This program is jointly financed by the states and the federal government and is administered on the local level by the individual states. A state need not participate in this program. If a state chooses to participate, it must submit a plan of administration to the Secretary of Health, Education, and Welfare. The Secretary approves the plan, and the state's participation in the program, if the plan satisfies the requirements of Section 402(a) of the Act, including the requirement (in Section 402(a)(10)) that the plan provide "that aid to families with dependent children shall be furnished * * * to all eligible individuals." The federal government then provides certain matching funds to the state.

The Iowa AFDC plan does not provide for payments of aid with respect to fetuses. The Secretary has approved the Iowa plan as consistent with Section 402(a)(10), under the theory that a fetus is

not a "child" within the meaning of Section 406(a) of the Act.

In this suit, respondents challenge Iowa's compliance with Section 402(a)(10). This challenge calls into question the correctness of the Secretary's interpretation of the Act. The outcome of this case may affect the operations of AFDC plans in more than thirty states that now deny benefits with respect to fetuses, and it will necessarily affect the future administration of federal assistance under the Act.

STATEMENT

Respondents, at the time they brought this action, were childless pregnant women who had been denied aid to families with dependent children under the State's AFDC plan. They contended that the denial of benefits to needy pregnant women violated Section 402(a)(10) of the Social Security Act of 1935, 42 U.S.C. 602(a)(10), which requires that state AFDC plans furnish assistance to "all eligible individuals." Respondents' claim to be "eligible individuals" rested upon the premise that where eligibility requirements are otherwise met, a fetus is a "dependent child" within the meaning of Section 406(a) of the Act.[1] The district court upheld their claim and granted declaratory and injunctive relief (Br. in Opp. App. A). The court of appeals affirmed (Pet. App. A).

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[1] We use the word "fetus" here to refer generally to the embryonic or fetal child from the time of medical verification of pregnancy.

SUMMARY OF ARGUMENT

The question presented here is whether a fetus is a "child" within the meaning of Section 406(a) of the Social Security Act. If a fetus is a "child" within the meaning of that statute, payments of aid to families with dependent children must be made on behalf of a fetus, and to the pregnant woman as the adult relative living with and caring for the "child," when the woman otherwise satisfies AFDC eligibility requirements.

The stated purpose of the AFDC title, its various provisions, and the legislative history, all reveal congressional concern only for living dependent children and their families. Section 401 of the Act states that the purpose of the AFDC program is to "encourag[e] the care of dependent children in their own homes or in the homes of relatives * * *." No provision of the AFDC title expressly applies to fetuses or unborn children, whereas many have application only to living children. The legislative history shows a predominant concern with "keep[ing] the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions." S. Rep. No. 628, 74th Cong., 1st Sess. 17.

Accordingly, we believe that Congress intended the word "child" to be given its commonly accepted meaning, *i.e.*, a living child, not a fetus. The Secretary's regulations permitting payments on behalf of fetuses are not to the contrary; they rest upon the assumption that the Secretary may authorize payments on behalf of persons other than "dependent children" in certain limited circumstances.

ARGUMENT

A FETUS IS NOT A "CHILD" WITHIN THE MEANING OF SECTION 406(a) OF THE SOCIAL SECURITY ACT

The narrow question of statutory interpretation presented by this case is whether a fetus is a "child" within the meaning of Section 406(a) of the Social Security Act. There is no issue here concerning the scope of the State's obligation under Section 402(a)(10) of the Act to furnish assistance to "all eligible individuals"; prior cases interpreting the latter provision make clear that if, as the courts below held, a fetus is a "child" under the Act, the State must provide assistance to pregnant women who otherwise satisfy AFDC eligibility requirements. See *Carleson* v. *Remillard*, 406 U.S. 598; *Townsend* v. *Swank*, 404 U.S. 282; *King* v. *Smith*, 392 U.S. 309.

1. Although Section 406(a) defines the phrase "dependent child," that definition does not speak directly to the question of statutory interpretation presented here. "Dependent child" is there defined as "a needy child (1) who has been deprived of parental support or care by reason of death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother * * * in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under

the age of eighteen * * *." [2] Although this language indicates that the focus of congressional concern was on living children, nothing in that language absolutely prohibits treating a fetus as a "child."

Other provisions of the statute, considered in isolation, are similarly ambiguous and inconclusive on this question. But read together, they strongly suggest that Congress, in enacting the AFDC program, was concerned only with the plight of living dependent children and not with the needs of fetuses and expectant mothers. Perhaps the clearest indication of this is in Section 401, which states that the purpose of the AFDC program is to "encourag[e] the care of dependent children in their own homes or in the homes of relatives * * *." That purpose, of course, applies only to living children, not to fetuses.

Other provisions of the statute also have application only to living children. See, *e.g.*, Section 402(a)(7) and (8) (relating to the extent that the child's income and resources are to be taken into consideration in determining his need); Section 402(a)(13), (14) and (15) (relating to the provision of social services to the child "in order to assist such child * * * to attain or retain capability for self-support"); Section 402(a)(16) (relating to protection against the child's "neglect, abuse, or exploitation"); Section 402(a)(17) (relating to children "born out of wedlock" or "deserted or abandoned by [their] parent[s]").

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[2] Sections 407 and 408 of the Act expand the definition to cover needy children in foster homes or whose parents are unemployed.

The legislative history also supports the view that Congress, in enacting the AFDC program, did not have in mind the needs of childless pregnant women. That history and the inferences properly to be drawn therefrom have been well summarized by the Second Circuit as follows (*Wisdom* v. *Norton*, No. 74-1402, decided October 11, 1974, slip op., pp. 5682-5684; footnotes omitted):

> * * * Congress manifested no concern at the time the statute was enacted or in subsequent amendments with making funds available for the benefit of unborn children.
>
> When the Social Security Act was discussed and debated prior to its enactment, what was to become the AFDC program was viewed as a counterpart to, and a federally funded extension of, state statutes known as "mothers' aid" or "mothers' pension" laws. These laws were described as follows:
>
> > "These are not primarily aids to mothers but defense measures for children. They are designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society." [Message of the President Recommending Legislation on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess. 30.]

Another report stated the following about these laws and the proposed AFDC program:

> "Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. * * *" [S. Rep. No. 628, 74th Cong., 1st Sess. 17. See also H. Rep. No. 615, 74th Cong., 1st Sess. 10-12.]

Finally, Title IV of the Act [relating to the AFDC program] emphasizes that it was designed "for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives." Thus, it is apparent that an essential purpose of AFDC was to provide assistance to children who were fatherless or whose absent father failed to provide support so that the mother would be released from a wage-earning role and she would remain at home, supervising their upbringing and preventing them from falling into delinquency. * * * It is equally apparent that this concern that the mother be in the home to raise the child only comes into play once the child is born. On the other hand, the principal purpose to be served by making payments for an unborn child would be the care of its mother during the pregnancy by providing nutrition, medication and health care, which no doubt would be beneficial to the unborn child. The Social Security Act at the time of its passage included a separate program which provides payments for maternal and prenatal health care, but it does so in Title V, not in Title IV which contains the AFDC provisions.

As the court of appeals in *Wisdom* v. *Norton* further pointed out (slip op., p. 5684, n. 27), the fact that Congress enacted a maternal and pre-natal health care program under a separate title of the Social Security Act, without making any mention of aid to needy pregnant women in the AFDC title, is "evidence—rather strong evidence when combined with the language and purpose of the AFDC provisions—of a congressional intent *not* to include unborn children under AFDC but to provide for maternity care in a different section of the statute."

Additional evidence of congressional intent is provided by the fact that the Social Security Act, as originally enacted, authorized AFDC payments only with respect to the needs of a dependent child. See 49 Stat. 629. Had Congress intended to include needy pregnant women within the AFDC program, presumably it would have permitted recognition of the needs of such women, since the needs of a fetus are not capable of independent determination. Moreover, when Congress in 1950 extended AFDC coverage to adult relatives living with and caring for the "dependent child" (see 64 Stat. 551), it did so in a manner that leaves little doubt that childless pregnant women were not the intended beneficiaries:

> In the present law, aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly in families with small children, it is necessary for the mother

> or another adult to be in the home full time to provide proper care and supervision. Since the person caring for the child must have food, clothing, and other essentials, amounts alloted to the children must be used in part for this purpose if no other provision is made to meet her needs. [H. Rep. No. 1300, 81st Cong., 1st Sess. 45-46.]

In short, additional provision was made for adult relatives living with and caring for the child, because a failure to do so would, as a practical matter, result in a reduction in the amounts actually available for the care of the child. That consideration obviously has no application to childless pregnant women.

This history shows that Congress, in enacting and subsequently amending the Social Security Act, intended the word "child" in the AFDC title to be given its commonly accepted meaning, *i.e.*, a living child, not a fetus.[3] Cf. *Malat* v. *Riddell*, 383 U.S. 569. As the court in *Wisdom* v. *Norton*, *supra*, observed (slip op., p. 5681):

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[3] Some dictionaries include "fetus" within the meaning of "child," but many do not. Compare, *e.g.*, the American Heritage Dictionary of the English Language (1969) and the Shorter Oxford English Dictionary (1933) with Funk & Wagnalls Standard Dictionary, International Edition (1958) and the Random House Dictionary of the English Language (Unabridged) (1966). See generally *Wisdom* v. *Norton*, *supra*, slip op. at p. 5681 and nn. 17 and 18. But when "child" does embrace "fetus" within its meaning, it is chiefly in specific phrases such as "with child" and "childbirth". See Webster's New International Dictionary (Second Ed.—Unabridged; 1959). The word "child" is not used in such a phrase anywhere in the AFDC title.

> "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." [*Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618.] We are of the view that the word "child" is commonly and ordinarily understood to mean a born child and not a fetus. Indeed, when it is intended to refer to a fetus it is usually modified by another word such as "unborn child."

The district court in *Parks* v. *Harden*, 354 F. Supp. 620, 623-624 (N.D. Ga.), reversed, No. 73-1855, decided December 2, 1974 (C.A. 5), similarly observed:

> As a matter of semantics, there simply is no way to conclude that the word "child" includes something else which is not a child, namely an unborn child. In legal terms, the unborn child is normally referred to as a fetus, or "quick," or *in utero* * * *.

If Congress had intended "child" to include fetus, surely it would have stated so in clear and unambiguous language. Cf. *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 414. It did not do so. To the contrary, nothing in either the statute or the legislative history suggests that Congress contemplated that a fetus would be included within the meaning of "child." We therefore conclude that a fetus is not a "child" within the meaning of the Act and that neither fetuses nor childless pregnant women are "eligible individuals".

2. This conclusion is not inconsistent with the Secretary's long-standing regulation (45 C.F.R. 233.90 (c)(2)(ii)) permitting the states, at their option, to make AFDC payments to pregnant women on behalf of themselves and their unborn children.[4] That regulation does not indicate an administrative understanding that Congress intended to provide such coverage. To the contrary, the Secretary has consistently taken the position that the statute does not require payments on behalf of a fetus as a "dependent child." See, *e.g.*, the briefs filed on behalf of the Secretary in *Murrow* v. *Clifford*, No. 114-73, decided June 12, 1973 (D. N.J.), vacated on other grounds, No. 73-1717, decided May 30, 1974 (C.A. 3); *Wilson* v. *Weaver*, 358 F. Supp. 1147 (N.D. Ill.), affirmed in part and reversed in part, 499 F.2d 155 (C.A. 7); *Adams* v. *Huecker*, No. 7815-B, decided June 14, 1974 (W.D. Ky.), appeal pending, No. 74-2213 (C.A. 6); *Stuart* v. *Canary*, 367 F.Supp. 1343 (N.D. Ohio).

The Secretary bases his regulation on his general discretionary rule-making authority under Section 1102 of the Act, 42 U.S.C. 1302. The Secretary interprets his authority under that provision as extending to the promulgation of regulations permitting payment of AFDC benefits on behalf of individuals other than "dependent children" where such pay-

[4] The regulations also provide for federal payment of one-half the administrative costs incurred by the states in verifying the fact of pregnancy. 45 C.F.R. 233.90(c)(3).

ments (1) are made on behalf of individuals who within a brief period will meet the statutory criteria for a "dependent child," (2) are consistent with and assist in achieving the purposes of the AFDC program, and (3) promote the efficient administration of that program. Pursuant to that view, the Secretary permits the states at their option to make AFDC payments on behalf of persons other than a "dependent child" in two limited circumstances: where a pregnant woman otherwise satisfies AFDC eligibility requirements, and where a needy child is, due to an emergency, living in the home of a nonrelative. '45 C.F.R. 233.90(c)(2)(ii) and (iv).[5]

In the Secretary's view, payments on behalf of a fetus are permissible because they assist the expectant mother to provide prospectively for the material needs of the child after birth, *i.e.*, when it has become a "dependent child," and also because they enable the expectant mother to maintain or improve her diet and general health and thereby increase the probability that she will give birth to a healthy child.

The court of appeals in *Wisdom* v. *Norton*, *supra*, expressed the view that the Secretary's regulations permitting payments on behalf of persons other than dependent children are invalid. But the validity of the Secretary's regulations was not before the court in *Wisdom* (~~home~~ moreover, the Secretary was not a party

[5] See also 45 C.F.R. 233.90(c)(2)(i) and (iii) (permitting payments for a full month on behalf of children living in the home for at least part of that month).

and did not file a brief in that case), nor is it at issue here.[6] The essential point here is simply that the Secretary's regulation in favor of needy pregnant women is not based upon an administrative understanding that a fetus is a "child" within the meaning of the Act. The agency charged with administration of the program has not interpreted the Act in a manner contrary to the position taken by the State.[7]

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[6] Congress is aware of the Secretary's regulation and apparently has acquiesced in it. Legislation to overturn the Secretary's policy of permitting payments to expectant mothers was proposed, but not enacted, in the 92d Congress. See H. Rep. No. 92-231, 92d Cong., 1st Sess. 184; S. Rep. No. 92-1230, 92d Cong., 2d Sess. 467.

[7] This point is also demonstrated by the fact that the Secretary has, following *Townsend* v. *Swank*, *supra*, and *Carleson* v. *Remillard*, *supra*, continued to approve state AFDC plans that exclude fetuses and childless pregnant women from coverage.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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